No. 89-1822

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOVENCIO F. MADARANG and J.F. MADARANG, D.D.S. & ASSOCIATES, A Professional Corporation,

Petitioners,

v.

MARIANO R. BERMUDES, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF COMMONWEALTH HEALTH PLANNING AND DEVELOPMENT AGENCY, JOSE T. VILLAGOMEZ, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES, AND THE COMMONWEALTH HEALTH COORDINATING COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the United States on the decision of the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1. Does the CNMI Certificate of Need Statute violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where by prohibiting the establishment of a new dental clinic on the basis of lack of need for it the statute effectively prohibits the petitioner (a qualified dentist) from pursuing his profession in private practice in the CNMI?

QUESTION 2. Does the CNMI Certificate of Need Statute violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution where by prohibiting the establishment of a new dental clinic on the basis of lack of need for it the statute discriminates against the petitioner (a qualified dentist) in that while he is prohibited from pursuing his profession in private practice one private practitioner is allowed to practice dentistry in the CNMI?

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STATEMENT OF GROUNDS FOR JURISDICTION

Date of Opinion - November 9, 1989

Date of Amended Opinion - January 19, 1990

Statutory Provision Conferring Jurisdiction - 28 USC §1254(1)

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

1. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 USC §1681 (West 1987)

Article IV
Judicial Authority

Section 402.

(a) The District Court for the Northern Mariana Islands will have the jurisdiction of

a district court of the United States, except that in all causes arising under the Constitution, treaties or laws of the United States it will have jurisdiction regardless of the sum or value of the matter in controversy.

Article V
Applicability of Clauses

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 1, 3 and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15, Amendment 19; and Amendment 26; provided, however, that neither trial by jury or indictment by grand jury shall be required in any

civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

Section 502

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title

XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

(3) those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

(2) United States Code:

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42 USC §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(3) Commonwealth Code of the Commonwealth of the Northern Mariana Islands:

3 CMC, Div. 2

CHAPTER 4.

Health Care Facilities

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Article 1. Health Care Services.

§2411. Dr. Torres Memorial Hospital.

§2412. Payment of Fees for Services.

§2411. Dr. Torres Memorial Hospital.

The Commonwealth Hospital, located on Saipan, shall be known as "Dr. Torres Memorial Hospital."

Source: DL 5-31, §1, (1977).

§2412. Payment of Fees for Services.

Individual or group fees shall be paid for all medical and dental services provided by the Commonwealth Government in accordance with schedules and regulations adopted by the Department of Public Health and Environmental Services, except for such services as the Department determines shall be free in order to best serve the public interest; provided, that no one in need of medical care shall be denied such care because of inability to pay all or any part of any fee established, and provided further, that there

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shall be no distinction in treatment or care based upon nonpayment or the amount of payment.

Source: 63 TTC §155.

Article 2. Health Care Certificate of Need.

§2421. Statement of Policy.

§2422. Definitions.

§2423. Certificate of Need Program.

§2424. Certificate of Need.

§2425. Dissemination and Publication of Certificate of Need Program.

§2426. Review Criteria for Certificate of Need Application.

§2427. Certificate of Need Review Process.

§2428. Suspension or Revocation of Certificate of Need.

§2429. Certificate of Need Not Transferable.

§2421. Statement of Policy.

The people of the Northern Mariana Islands are dependent upon the existence of an efficient, effective, and well coordinated

program of health care services and disease prevention activities. In order to achieve the necessary level of efficiency, effectiveness, and coordination there is a continuing need for a rational program for the determination and allocation of scarce health resources. In addition, the impending termination of the Trusteeship Agreement and the probable change in resources available for the delivery of health care and environmental health protection services require a careful analysis of any proposed allocation of funds and resources to be used to provide health care, related services, and environmental health protection services to insure that these funds and resources shall be utilized in accordance with the needs of the people of the Northern Mariana Islands. Therefore, it is declared to be the public policy of the Northern Mariana Islands, and the purpose of this Article to develop and operate a

program which will identify the health needs of the residents of the Northern Mariana Islands and insure that resources which are proposed for health programs or services meet those needs in the most efficient and effective manner.

Source: DL 556, §2

Commission Comment: This Article, effective October 27, 1977, may be cited as the Commonwealth Health Care Certificate of Need Act. (DL 5-56, §§1, 12)

§2422. Definitions.

As used in this Article unless the context otherwise requires:

(a) "Certificate of Need" means an authorization, when required under this Article, to construct, expand, alter or convert a health care facility or to initiate, expand, or modify a health care service or organization.

(b) "Executive Director" means the

executive director of the Commonwealth Health, Planning and Development Agency.

(c) "Commonwealth Health Coordinating Council" means that health coordinating council created by the Governor pursuant to Section 2075 of Title 1 of this Code.

(d) "Agency" means the Commonwealth Health Planning and Development Agency, established by law as the Commonwealth's designated agency to administer its health planning and development functions.

(e) The "Commonwealth Health Plan" is that comprehensive five year health plan prepared and established under the provision of Public Law 93-641, as amended (42 USC §300k et seq.), which shall include a medical facilities plan and an environmental health section.

Source: DL 5-56, §3

§2423. Certificate of Need Program.

There is established the Commonwealth

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certificate of need program which prescribes the means, procedures, and requirements for health care providers to apply for and obtain certificates of need prior to undertaking construction, expansion, alteration, or conversion of health care facilities or initiation, expansion, or modification of health care services caused under this Article, including acqquisition of equipment.

Source: DL 5-56, §4

§2424. Certificate of Need.

(a) No person, corporation, association, political subdivision or agency, whether public or private, may make capital expenditures for activities enumerated in Subdivision (b) without first obtaining a certificate of need as required under this Article.

(b) A certificate of need shall be required prior to:

(1) The development of all new institutional health services including,

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but not limited to the construction, development, or other establishment of any health facility; and

(2) Any capital expenditures by or on behalf of a health care facility in excess of $50,000, excluding health care facilities; and

(3) The offering by a health care facility of health services which were not offered on a regular basis in or through such health care facility within the 12 months period next proceeding the time such services would be offered; and

(4) A substantial change in the bed capacity of a health care facility which increases the total number of beds, redistributes beds among various categories, or relocates beds from one physical facility or site to another; and

(5) Pre-development activity expenditures in excess of $50,000 for the offering

of new institutional health services including, but not limited to, expenditures for preliminary plans, studies, surveys, site acquisitions, architectural designs, plans, working drawings, and specifications, provided that any certificate of need issued under this subdivision shall be for pre-development activities only and shall not authorize the offering or development of the new institutional health service for which such pre-development activities are proposed.

(c) Application for certificates of need shall be filed with the Agency on application forms provided by the Agency and shall contain such information and be in such form as the Executive Director may require.

(d) The Agency shall issue a certificate of need to an applicant if the Agency has determined that the proposed health facility, service, or organization is in the inter-

est of public health, safety, and welfare, that such facility or service is compatible with the priorities of the current health plan, and that the proposed project complies with this Article and regulations adopted under this Article.

Source: DL 5-56, §5

§2425. Dissemination and Publication of Certificate of Need Program.

Upon enactment of this Article or any amendments or of any regulations under this Article, the Agency shall disseminate to all health care facilities or health care programs within the Commonwealth and shall publish in at least two newspapers of general circulation the requirements of the certificate of need program under this Article and regulations.

Source: DL 5-56, §6

§2426. Review Criteria for Certificate of Need Application.

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(a) The Agency shall adopt regulations under this Article prescribing criteria for the review of certificate of need applications.

(b) Prior to the adoption of review criteria the Agency shall:

(1) Give interested persons an opportunity to offer written comments on the proposed review criteria; and

(2) Distribute copies of its proposed review criteria to government health agencies, private health organizations, the Governor, and to other persons requesting them.

(3) The Agency shall distribute copies of its adopted review criteria and any revisions thereof to the agencies and organizations specified in subdivision (2) to the Governor, and to the Legislature. It shall also provide copies to other persons upon request.

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Source: DL 5-56, §7.

§2427. Certificate of Need Review Process.

The Agency shall adopt regulations under this Article prescribing a review process for certificate of need applications. Prior to the adoption of these regulations, the Agency shall:

(a) Give all interested parties a reasonable opportunity to offer written comments on the proposed review process; and

(b) Distribute copies of its proposed review procedures to health organizations, the Commonwealth Health Coordinating Council, the Governor, and other interested persons upon request; and

(c) Publish the proposed review procedures in at least two newspapers of general circulation in the Commonwealth at least 60 days prior to their adoption.

Source: DL 5-56, §8

§2428. Suspension or Revocation of Certificate of Need.

(a) The Agency may suspend a certificate of need if:

(1) The application contains false or misleading information or omits known material facts; or

(2) Circumstances based upon which the certificate of need was issued have changed or new circumstances have developed which alter the need for the project, provided that the change or new circumstances occurs prior to the commencement of construction or substantial expenditure or obligation of funds.

(3) Any holder of a certificate of need is entitled to an administrative hearing prior to the suspension of its certificate of need.

(b) The Agency may revoke a certificate if:

(1) The application contains false or misleading information or omits known material facts; or

(2) If the holder of the certificate of need has not demonstrated continuing progress towards commencement of construction or project implementation.

(3) Any holder of a certificate of need is entitled to an administrative hearing prior to the revocation of its certificate of need.

Source: DL 5-56, §§9, 10

§2429. Certificate of Need Not Transferable.

A certificate of need issued under this Article is not transferable without the prior written approval of the Agency.

Source: DL 5-56, §11.

STATEMENT OF THE CASE

Jovencio F. Madarang, a resident and

practicing dentist in Guam, and his professional corporation, J.F. Madarang and Associates, D.D.S. filed a complaint in the United States District Court for the Northern Mariana Islands claiming that their application to establish a dental clinic in the CNMI had been denied in violation of the equal protection and due process clauses of the Fourteenth Amendment, and various other laws and statutes, including 42 USC §1983. Dr. Madarang's complaint was based on CNMI's Certificate of Need Law (CON) which requires health facilities desiring to make (1) any capital expenditures over $50,000, or (2) any new health services regardless of costs to receive permission to make such establishment of a clinic from the Commonwealth Health Planning and Developing Agency (CHPDA) who then recommends to the Commonwealth Health Coordinating Council (CHCC) to give permission or to deny it on the ground that, among other

things, there is no need for another facility (e.g. dental clinic).

The petitioner's application was rejected on the ground that, among other things, there was no need for another dental clinic in the Northern Mariana Islands. There are only two dental clinics existing in Saipan. One is owned by the Government and the other one is owned by the Seventh Day Adventist.

With the finding that there was no need for another dental clinic, the petitioners were and are effectively and permanently prohibited from establishing a dental clinic in the Northern Mariana Islands as long as there is still no need for another dental clinic.

The U.S. District Court for the Northern Mariana Islands held that the CON statute violated the Fourteenth Amendment to the U.S. Constitution [Equal Protection and Due Process Clauses] citing Truax v. Raich [239 US 33, 41] (1915) for the principle that

"it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure". The court then applied strict judicial review and finding no compelling interest in such prohibition, it struck down the statute as unconstitutional. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed arguing that the right to pursue a profession or calling is not a fundamental right and there is a rational basis for discriminating the petitioners in their attempt to establish a clinic in the Northern Mariana Islands.

Considerations for Review on Certiorari

In making the decision in this case, the 9th Circuit Court has decided a very important question of federal law in that contrary to a long line of U.S. Supreme Court cases starting with Allgeyer v. Louisiana,

165 US 578, 41 L Ed. 832, 17 S Ct 427 (1897) and contrary to the implication of a fundamental right status of persons pursuing their profession or calling in Supreme Court of New Hamphshire v. Piper, 470 US 274, 84 L Ed 2d 205, 106 S Ct 1271 (1985), it held that there is no fundamental right to pursue a profession or calling. Such decision has such nationwide ramifications that States can now fail safe in legislating laws that will disallow lawyers and doctors to practice their profession in their jurisdictions. All they have to do is make a finding that there are too many doctors, lawyers, dentists, etc. and these professionals may not practice in their jurisdiction on the sole ground that there is no longer any need for any more doctors, lawyers, or dentists.

This 9th Circuit decision is in conflict with the decision of the Fifth Circuit Court of Appeals in Phillips v. Vandygriff, 711

F 2d 1217 (5th Cir. 1983) which recognizes that the right to work for a living is a fundamental right.

This 9th Circuit decision is also in conflict with a North Carolina Supreme Court decision in Re Certificate of Need For Aston Park Hosp., 282 NC 542, 193 SE2d 729, 61 ALR 3d 268 (1973) which relied on its interpretation of this Court's decisions in Northern Securities Company v. United States, 193 U.S. 197, 24 S Ct 436, 48 L Ed 679 (1904) and Lawton v. Steele, 152 US 133, 137, 14 S Ct 499, 38 L Ed 385 (1894) to support its decision to strike down a Certificate of Need law of North Carolina.

Finally, the 9th Circuit Court in its analysis of the rational basis test in this case ignores, and its decision is in conflict with, the notion of "legitimate state interest" made by this Court in Zobel v. Williams, 457 US 55, 72 L Ed 2d 672, 102 S Ct 2309 (1982).

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Right To Pursue A Calling or Profession Is A Fundamental Right and Serious Interference With It by State Law Triggers Enhanced or Strict Judicial Scrutiny in Equal Protection and Due Process Clause Analysis

At the outset, the petitioners recognize that insignificant and narrowly limited interference by State laws of a person's right to liberty has been and should be upheld as a legitimate exercise of police power, assuming a showing of a rational basis for the exercise of such power. Thus, in New Orleans v. Dukes, 427 US 297, 49 L Ed 2d 511, 96 S Ct 2513 (1976) where a city ordinance sought to prohibit vendors with pushcarts to sell within Vieux Carre (a part of the City of New Orleans) except during Mardi Gras was held to be not violative of the Equal Protection Clause when it was shown that the ordinance was trying to ameliorate certain evils (e.g. hawkers and peddlers

disturbing the tourists and disrupting their enjoyment of the charm and beauty of the place). (The ordinance did not prohibit the said vendors from selling somewhere else in the city.) Also, in Village of Belle Terre v. Boraas, 416 US 1, 39 L Ed 2d 797, 94 S Ct 1538 (1974), this Court sustained the ordinance which prohibited unrelated individuals from living together in a single dwelling unit when it was shown that the ordinance bore a rational relationship to permissible state objectives.

But when this Court was confronted with a more serious interference with liberty rights guaranteed by the Fourteenth Amendment, the Court did not hesitate to strike down the challenged ordinance. This Court in Zablocki v. Redhail, 434 US 374, 54 L Ed 2d 618, 98 S Ct. 673 (1978) established this no-retreat zone when it said:

> When a statutory classification significantly interferes with the

> exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important interests and is closely tailored to effectuate only those interests. (Emphasis supplied).

Indeed, in Moore v. East Cleveland, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977) where this Court struck down an East Cleveland ordinance which regulated the occupancy of its housing by "slicing deeply into the family itself." Mindful of the history of the Lockner era, the Court said that "That history counsels caution and restraint. But it does not counsel abandonment." 431 US at 502; 52 L Ed 2d at 539. And added that "appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society." 431 US at 503; 52 L Ed 2d at 539-540.

The Certificate of Need Statute slices deeper into the right of any person to pursue

his calling or profession. If a dentist cannot put up his own clinic, he cannot pursue his dental profession because he cannot be expected for purposes of safety and welfare of his patients to practice with pushcart clinic similar to that of vendors selling goods with a pushcart. The Certificate of Need Statute is therefore calculated to prohibit a dentist or doctor from practicing their profession in the Northern Mariana Islands (CNMI) on the ground that there is no need for any more dental clinic or medical clinic in the CNMI.

A

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution basically prohibits the deprivation of liberty and property rights without due process of law. Where a challenged restriction depriving a person of property or liberty rights is "clearly arbitrary and unreasonable, having

no substantial relation to the public health, safety, morals, or general welfare" it violates the Due Process Clause. See Eastlake v. Forest City Enterprises, Inc., 426 US 668, 676, 49 L Ed 2d 132, 139, 96 S Ct 2358 (1976).

There is no question that the right to pursue a calling or profession is a fundamental right and "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." Truax v. Raich, 239 U.S. 33, 41, 36 S Ct. 7, 10, 60 L Ed 131 (1915). This acknowledgment is sustained by a long line of cases beginning with Allgeyer v. Louisiana, 165 U.S. 578, 589, 590, 41 L Ed 832, 835, 836, 17 S Ct 427 (1897). In 1983 the 5th Circuit Court of Appeals cited it in Phillips v. Vandygriff, 711 F 2d 1217, 1222 (5th Cir. 1983).

In the instant case, the Certificate

of Need Statute of the CNMI cannot be justified by a mere showing that the CNMI has an interest in preventing private individuals from duplicating facilities or services, as the 9th Circuit reasons. In other words, according to the 9th Circuit's decision, a State may prohibit a private individual from spending his own personal funds to build his own clinic because others already have their clinics and there is no need for any more of them. This is a very dangerous precedent. New lawyers, new doctors, and new dentists might end up selling newspapers on the sidewalk if States are permitted to exclude professionals from private practice of their profession on the sole basis that new law offices, dental clinics, or medical clinics are no longer needed in a State.

This reason, if ever it qualifies as one, is clearly arbitrary and unreasonable and has no substantial relation to the public

health, safety, morals, or general welfare.

B

The Equal Protection Clause also prohibits discrimination and its constitutionality may be subjected to stricter scrutiny. This Court in Trimble v. Gordon, 430 US 762, 52 L Ed 2d 31, 97 S Ct 1459 (1977) succinctly laid out this test by saying:

> Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.

430 US at 767, 52 L Ed 2d at 37. It has been held that a strict scrutiny analysis requires a showing that "the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest." San Antonio School District v. Rodriguez, 411 US 1, 33 (n. 73), 36 L Ed 2d 16, 43 (n. 73), 93 S Ct 1278 (1973); see also

Shapiro V. Thompson, 394 US 618, 634, 22 L Ed 2d 600, 89 S Ct 1322 (1969).

There is no question that pursuing a calling or profession is a fundamental right. It is also clear that the Certificate of Need Statute does not merely make insignificant restrictions like the New Orleans ordinance did in Dukes, supra. The very core of the Certificate of Need restriction unmistakably shows that a dentist cannot pursue private practice of dentistry anywhere or anytime in the CNMI since the respondents had already determined that there was no more need for another dental clinic, there being already two dental clinics, namely one government owned clinic and one dental clinic privately owned by Seventh Day Adventist.

The discrimination challenged here therefore is that the Government allows two clinics to continue operating and prohibits

the petitioners from pursuing their profession by not allowing them to establish their own dental clinic. Because this statutory classification approaches a sensitive and fundamental right, which is seriously and significantly interfered with here, the respondent ought to be required to show a compelling state interest. The interest which the 9th Circuit Court found is not a compelling state interest. In fact, no compelling state interest can be discerned in this discriminatory prohibition.

II

The Certificate of Need Statute of the CNMI Lacks a Legitimate Interest in Discriminatorily Prohibiting the Establishment of a Private Dental Clinic in the CNMI on the Basis That There is No Need For Another Dental Clinic.

The Equal Protection Clause "requires, at a minimum, that statutory classification bear some rational relationship to a legitimate state purpose." Trimble v. Gordon, supra, at 430 US at 766, 52 L Ed 2d at 37, 97 S

Ct 1439 (1977). In the last few years, this Court has not only scrutinized whether in an equal protection analysis requiring a rational basis test a statutory classification is rationally related to a state purpose, but also whether the state purpose itself is legitimate. In Zobel v. Williams, 457 55, 72 L Ed 2d 672, 102 S Ct 2309 (1982), this Court rejected the notion that giving greater dividends to persons, whose residency in Alaska was more established than others, was a legitimate state interest. Chief Justice Burger, speaking for the Court, said:

> Assuming arguendo, that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the State in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment. (Emphasis supplied).

457 US at 62, 72 L Ed 2d at 678-679; see also 457 US at 72, 72 L Ed 2d at 685 (Justice

O'Connor, concurring).

The teaching of this Court in Zobel is clear. In every case where the legitimacy of a State interest is questioned, this question must be asked: Is the State's interest served in any way by the discriminatory statutory classification's objective?

In the instant case the Certificate of Need Statute's objective is to prevent duplication of facilities or services by private individuals. Is the CNMI's interest served in any way by such objective? The CNMI would not lose anything if more dental clinics were established in the Northern Mariana Islands. The CNMI does not subsidize private clinics.

The public would not suffer if there were more dental clinics. Indeed, the dental patients would be served promptly if there were more dental clinics, since dental appointments that make a patient wait for weeks

are normally due to numerous patients that have to be served at a given time. This is not to mention that competition tends to result to a charging of lower fees.

Neither the fact that particular persons may profit from such discrimination nor the fact that they will lose as a result of such discrimination makes an objective a legitimate state interest. In Zobel, the rewarding of citizens for past contributions or long residence was held not to be legitimate interest. Any suggestion that a legitimate state interest can be found in the fact that the Seventh Day Adventist dental clinic would financially profit from such discrimination and monopoly would be abhorrent to any reasonable person and cannot be a legitimate state interest.

CONCLUSION

For the reasons given above, the petitioners pray that the Court grant them a writ of certiorari for review of this case.

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-2608
DC NO. CV-86-0012-AL

JOVENCIO F. MADARANG, J.F. MADARANG & ASSOCIATES, D.D.S., A PROFESSIONAL CORPORATION,

Plaintiffs-Appellees,

v.

MARIANO R. BERMUDES, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF COMMONWEALTH HEALTH PLANNING AND DEVELOPMENT AGENCY; JOSE T. VILLAGOMEZ, INDIVIDUALLY AND AS A DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES, AND THE COMMONWEALTH HEALTH COORDINATING COUNCIL,

Defendants-Appellants..

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern Mariana Islands
Alfred Laureta, District Judge, Presiding

Argued and Submitted

June 7, 1989 - San Francisco, California

Filed November 9, 1989

Amended January 19, 1990

Before: Thomas Tang, William C. Canby, Jr.
Diarmuid F. O'Scannlain, Circuit Judges

ORDER

The last sentence of the opinion shall REVERSED and REMANDED".

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

With the above change, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O"SCANNLAIN, Circuit Judge:

We are asked to decide whether the Certificate of Need ("CON") regulations of the Commonwealth of the Northern Mariana Islands

("CNMI"), as applied to Dr. Madarang violate the fourteenth amendment.

I

J.F. Madarang and Associates, D.D.S. ("Dr. Madarang" or "appellant") filed a complaint in the United States District Court for the Northern Mariana Islands claiming that his application to establish a dental clinic in the CNMI had been denied in violation of the equal protection and due process clauses of the fourteenth amendment, and various other laws and statutes. Dr. Madarang's complaint was based upon the CNMI's Certificate of Need regulations which require health facilities desiring to make (1) any capital expenditures over $50,000, or (2) any new health services regardless of cost, among other changes, to receive permission to make such changes from the CON panel. Dr. Madarang's duly filed application for a CON was rejected by the government of CNMI,

whereupon he filed this action pursuant to 48 U.S.C. §1694(c) alleging federal question jurisdiction under 28 U.S.C. §1331.

After a brief non-jury trial, the district court made the following pertinent findings of fact:

11. In the CNMI, the capital expenditure figure which triggers the requirement of obtaining a Certificate of Need is $50,000, not the federal figure of $400,000...No legislative history explains or justifies this charge.

* * *

15. On or about June 25, 1986, plaintiffs submitted a "Certificate of Need" (CON) application to the Commonwealth Health Planning and Development Agency (CHPDA).

* * *

17. CHPDA made a formal recommendation to the Commonwealth Health Coordinating Council (CHCC) that the application be denied.

18. After a public hearing, attended by plaintiff Madarang and his attorney, the application was denied.

The court also made the following conclusion of law:

1. The United States Supreme Court has recognized the inherent friction between pervasive federal regulatory schemes and anti-trust laws and personal freedom. See, e.g. **National Gerimedical Hospital and Gerontology Center v. Blue Crosss of Kansas City** [452 U.S. 378](1981).

2. Here, the U.S. Congress sought to achieve certain goals in the health care field by enacting the National Health Planning and Resources Development Act of 1974, while at the same time making it as least restrictive as possible.

3. The Fourteenth Amendment to the United States Constitution applies fully in the Commonwealth of the Northern Mariana Islands.

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, §501(a). [See Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, reprinted in U.S.C. §1681] note (1982).]

4. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." **Truax v. Raich**, [239 U.S. 33, 41] (1915). See also **Board of Regents of State Colleges v. [R]oth**, [408 U.S. 564, 572](1972).

5. Because the right to pursue an occupation is a fundamental right protected by the 14th Amendment it is subject to strict judicial review and any statute which discriminates can only be justified by a compelling state interest. [Citing] **San Antonio Indepen-**

dent School District v. Rodriguez, [411 U.S. 1, 19](1973).

6. The CNMI's $50,000 capital expenditure figure, which triggers the requirement of a "certificate of need," is an impermissibly restrictive law, the effect of which is to preserve and extend the existing monopolies and not to control the allocation of scarce health resources. Under the current CNMI law it would be nearly impossible for a new health care provider to open here. Every time an application was received the entrenched health care provider could respond, as was done here, that they either provided the service already or could and would expand to provide it. The statute is so restrictive that it cannot be justified by the state interest of maximizing health care resources and is, therefore, unconstitutional.

The court held that "[t]he CNMI Certificate of Need statute is struck down as uncon-

stitutional and judgment is granted in favor of plaintiffs.

Bermudes and the government of CNMI timely appeal.

II

[1] We have previously held that the fourteenth amendment applies to the CNMI. **Fleming v. Department of Public Safety**, 837 F 2d 401, 408-09 (9th Cir.) **cert. denied**, 109 S. Ct. 222 (1988). However, the district court's application of the equal protection clause of the fourteenth amendment to the facts in this case is flawed. The fourteenth amendment states, in pertinent part, that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV. We have held that "[t]he first step in equal protection analysis is to identify the state's classification of groups." **Country Classic Dairies v. Milk Control Bureau**, 847 F.2d

593, 596 (9th Cir. 1988). The District court made no such analysis in this case. The only finding with respect to this issue is in paragraph 11 of the findings of fact which compares triggering of the CON application requirements with a different threshold under federal law. The CON regulations distinguish, among other classifications, between those who spend less than $50,000 to establish a health care facility and those who would spend more. The CON regulations also distinguished between those who were currently providing health care in the Northern Mariana Islands and those who wanted to provide such services. Madarang does not contend that the statute creates any suspect classifications.

[2] "The next step in equal protection analysis [is] ... to determine the level of scrutiny." **Country Classic**, 847 F.2d at 596. As stated in **Country Classic**, "[t]he

Supreme Court has held that the right to pursue a calling is not a fundamental right for purposes of the Equal Protection Clause." **Id.** (citing **City of New Orleaans v. Dukes**, 427 U.S. 297, 303-05 (1976)(per curiam). As a result, "[t]his court may 'presume the constitutionality of the ... discriminations and require only that the classification challenged be rationally related to a legitimate state interest." **Id.**

This court has stated that "in the area of economics and social welfare, legislative classification satisfies requirements of equal protection if it has some 'reasonable basis' and if any state of facts can be conceived to justify it." **Christy**, 857 F.2d at 133132.

[3] The Commonwealth has a legitimate interest in preventing the establishment of unneeded facilities. The parties themselves stipulated that "[t]here is no need for a

third dental clinic on Saipan, as the term 'need" is used in connection with the Certificate of Need." The various regulations do not define "need" except insofar as listing fourteen criteria by which the CON members are to judge whether a CON should be issued. Certificate of Need Manual, Commonwealth Register Vol. 5 No. 6 at 2265-66 (1983). These criteria all relate to determining whether or not CNMI citizens' health needs would be better served by the new or expanded facility. The "CON regulations are rationally related to preventing "duplication of facilities and services and to encourage the development of such facilities where they are needed" in the CNMI. Id at 2215. Enforcement of the CON regulations does not violate the equal protection clause of the fourteenth amendment.

III

[4] Dr. Madarang also claims that the

rejection of his CON application violated the due process clause. No evidence suggests that he was denied procedural due process: the district judge made no findings on this matter and nothing in the records suggests such a violation. Similarly, Dr. Madarang claims that a substantive due process violation occurred. The nature of the purported violation of substantive due process is not specified either by Madarang or by the district court, and none is apparent from the record. The days when courts regularly struck down economic legislation on substantive due process grounds, as in **Lochner v. New York**, 198 U.S. 405 (1905), have long since passed. It is abundantly clear today that economic regulation of professional services need not violate substantive due process. See **North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores**, 414 U.S. 156, 16467 (1973)(previous authority restricting rights

of states to regulate drugstore business discredited); **Ferguson v. Skruppa**, 372 U.S. 726 (1963) (no violation of due process or equal protection to abolish, except as practiced by lawyers, business of debt adjusting). In light of the clear position of the Supreme Court for over fifty years, the ruling of the district court cannot stand.

REVERSED and REMANDED.

APPENDIX B

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

TRIAL DIVISION

CIVIL ACTION NO. 86-0012

JOVENCIO F. MADARANG AND J. F. MADARANG, D.D.S. & ASSOCIATES, A PROFESSIONAL CORPORATION,

Plaintiffs,

v.

MARIANO R. BERMUDES, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF COMMONWEALTH HEALTH PLANNING AND DEVELOPMENT AGENCY, JOSE T. VILLAGOMEZ, INDIVIDUALLY AND AS A DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENTAL SERVICES, AND THE COMMONWEALTH HEALTH COORDINATING COUNCIL,

Defendants.

FILED
JANUARY 5, 1988.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court on November 24, 1987, for non-jury trial. At the conclusion of plaintiffs' evidence defendants moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. The Court took the motion under advisement and proceeded to hear the brief testimony offered by defendants.

FINDINGS OF FACT

The Court makes the following findings of fact, which are derived from the stipulation of the parties, judicial notice of federal and Commonwealth statutes, and the sparse competent evidence presented by plaintiffs at trial.

1. The National Health Planning and Resources Development Act of 1974, Pub. L. 93-641, January 4, 1975, 88 Stat. 2225, was enacted by the federal government to combat the twin evils of an inadequate supply and distribution of health resources and infla-

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tionary increases in the cost of health care. 42 U.S.C. §300K, et seq.

2. The Health Planning and Resources Development Amendments of 1979, Pub. L. 96-79, §103(e), 93 Stat. 595, added another goal, "preserving and improving...competition in the health service area," 42 U.S.C. §3001-2(a)(5) (1976 ed., Supp. IV). "Competition and consumer choice" are to be favored whenever they "can constructively serve...to advance the purposes of quality assurance, cost effectiveness, and access." 42 U.S.C. §300K-2(e)(17) (1976 ed., Supp. IV)

3. The Northern Mariana Islands, like other jurisdictions, was required to comply with the federal law as a condition to continued receipt of federal health program funds. 42 U.S.C. §300m(d).

4. Some of the requirements of the federal law were waived or altered for certain states and territories, including the Northern

Mariana Islands. 42 U.S.C. §300n-5. The changes primarily allow smaller jurisdictions to combine some functions.

5. The "Certificate of Need" program directed by federal law to be established in the CNMI and other jurisdictions "applied to the obligation of capital expenditures...- and the offering... of new institutional health services and the acquisition of major medical equipment..." 42 U.S.C. §300m-2(a)-(4)(A).

6. "Institutional health services" are health services which are provided "through private and public hospitals, rehabilitation facilities, nursing homes, and other health care facilities" and which entail "annual operating costs of at least the expenditure minimum." 42 U.S.C. §300n(5). (Emphasis added).

7. "Expenditure minimum" for a twelve-month period is $250,000. Id.

8. "Major medical equipmen" is defined as medical equipment used for the provision of medical and other health services and which costs more than $400,000. 42 U.S.C. §300n(7).

9. No individual who as a member or employee of a Statewide Health Coordinating Council (SHCC) shall, by reason of his or her performance of any duty, function, or activity required of, or authorized to be undertaken by, the SHCC, be liable for payment of any damages under any law of the United States or any state (or political subdivision of a state) if he believed he was acting within the scope of his duty, function, or activity as such a member of employee, and acted, with respect to that performance, without gross negligence or malice toward any persons affected by it. 42 U.S.C. §300m-3(d).

10. 3 Commonwealth Code (C.M.C.) §2411

et seq., and the "Certificate of Need" regulations therein were enacted pursuant to 42 U.S.C. §300K, et seq., the federal government's "National Health Planning and Development" law.

11. In the CNMI, the capital expenditure figure which triggers the requirement of obtaining a Certificate of Need is $50,000, not the federal figure of $400,000. 3 C.M.C. §2426. No legislative history explains or justifies this change.

12. The Commonwealth Health Planning and Development Agency (CHPD) and the Commonwealth Health Coordinating Council (CHCC) are government regulatory agencies which were statutorily created to administer the "Certificate of Need" (CON) program for the Commonwealth of the Northern Mariana Islands (CNMI).

13. Jovencio Madarang is a natural person, citizen of the United States, and a

resident of the Territory of Guam.

14. J. F. Madarang, D.D.S. & Associates is a professional corporation, incorporated in the Commonwealth of the Northern Mariana Islands.

15. On or about June 25, 1986, plaintiffs submitted a "Certificate of Need" (CON) application to the Commonwealth Health Planning and Development Agency (CHPDA).

16. Prior to agency action on the application, plaintiffs incurred expenses and obligations in furtherance of the proposed dental clinic. These expenses were not proved at trial. In addition, plaintiff was advised that he should not incur expenses until he had first complied with the CON requirements.

17. CHPDA made a formal recommendation to the Commonwealth Health Coordinating Council (CHCC) that the application be denied.

18. After a public hearing, attended by plaintiff Madarang and his attorney, the

application was denied.

19. Jose T. Villagomez, Director of the Department of Public Health and Environmental Services attended the hearing and spoke.

20. Dr. Villagomez is not a voting member of CHCC, and took no part in the final vote.

21. The only other private dental facility in the CNMI, the Seventh-Day Adventist Clinic, was built and has been continuously operating since prior to enactment of DL 5-56, 3 CMC 2424 et seq, the Certificate of Need Law.

22. Reviewing, approving or disapproving CON applications is a duty of CHPDA, delegated by the statute.

23. 42 U.S.C. §300K, et seq., the "National Hdalth Planning and Development" law, was repealed November 14, 1986 effective January 1, 1987, Pub. L. 99-660, 100 Stat. 3799.

CONCLUSIONS OF LAW

1. The United States Supreme Court has recognized the inherent friction between pervasive federal regulatory schemes and anti-trust laws and personal freedom. See, e.g., National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 101 S Ct. 2415 (1981).

2. Here, the U.S. Congress sought to achieve certain goals in the health care field by enacting the National Health Planning and Resources Development Act of 1974, while at the same time making it as least restrictive as possible.

3. The Fourteenth Amendment to the United States Constitution applies fully in the Commonwealth of the Northern Mariana Islands. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, §501(a).

4. "It requires no argument to show

that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 36 S.Ct. 7, 10 (1915). See, also, Board of Regents of State Colleges v. Roth, 92A S.Ct. 2701, 2706-2707 (1972).

5. Because the right to pursue an occupation is a fundamental right protected by the 14th Amendment it is subject to strict judicial review and any statute which discriminates can only be justified by a compelling state interest. San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278, 1289 (1973).

6. The CNMI's $50,000 capital expenditure figure, which triggers the requirement of a "certificate of need", is an impermissibly restrictive law, the effect of which is to preserve and extend the existing monopolies

and not to control the allocation of scarce health resources. Under the current CNMI law it would be nearly impossible for a new health care provider to open here. Every time an application was received the entrenched health care providers could respond, as was done here, that they either provided the service already or could and would expand to provide it.The statute is so restrictive that it cannot be justified by the state interest of maximizing health care resources and is, therefore, unconstitutional.

The Court notes the complete failure of proof of damages at trial. However, even had damages been proved, the evidence should that plaintiffs had been forewarned that it would be inadvisable to incur expenses prior to a decision on the certificate of need application. In addition, damages from individuals working in these programs are available only upon a showing of gross negli-

gence or malice. Absolutely no evidence of the prohibited conduct was offered or proved.

The CNMI Certificate of Need statute is struck down as unconstitutional and judgment is granted in favor of plaintiffs. No damages are awarded.

Dated this 22nd day of January, 1988.

(sgd) Alfred Laureta
Judge Alfred Laureta